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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO.

NORTH CAROLINA NATIONAL BANK,

Petitioner

vs.

UNITED STATES CASUALTY COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays this Court for a Writ of Certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the petitioner respectfully shows to this Court:

THE OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in this case is reported at 317 F. 2d 304 (4th Cir.), and is printed as an appendix to this Petition. This case came to that Court on appeal from a decision of the United States District Court for the Western District of North Carolina. The opinion of the United States District Court is reported at 208 F. Supp. 452, and is printed in the record which has been filed with this Court.

JURISDICTION OF THIS COURT

The judgment of the United States Court of Appeals for the Fourth Circuit, which the petitioner now asks this Court to review, is dated May 20, 1963, and was entered by that Court on that date.

Jurisdiction to review the decision of the Court of Appeals, through the procedure of certiorari, is conferred upon this Court by the provisions of 28 USC § 1254.

QUESTION PRESENTED FOR REVIEW

Upon a "Bankers Blanket Bond," widely issued by bonding companies to National banks throughout the country, is not ambiguity in the wording of the bond to be resolved in favor of recovery upon the bond?

STATEMENT OF THE CASE

This is a suit upon a standard "Bankers Blanket Bond" which has become the subject of litigation and conflicting Court decisions in an increasing number of cases in the Federal Courts. In the present case this "standard form" bond was issued by the de-

fendant United States Casualty Company to the plaintiff, now petitioner, North Carolina National Bank.

This bond, in its Clause E, insured the Bank against "any loss through the Insured's having . . . extended any credit . . . or otherwise acted upon any . . . documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker . . . or raised or otherwise altered or lost or stolen."

On August 14, 1959, the Bank learned that certain collateral, upon which it had been lending large sums of money to one of its customers, was spurious and fraudulent. The resulting loss to the Bank, after all efforts at collection and salvage, was established at $211,474.76 (38)[1].

The Bank demanded that the defendant Casualty Company indemnify it for this loss under the provisions of the aforesaid "Blanket Bond" (4, 6). The Casualty Company refused to do so (4, 6). Out of this demand and refusal the present suit arises.

The transactions which resulted in the Bank's loss were as follows. Over a substantial period of years the Bank loaned money and extended credit to C. K. Callaham & Sons Lumber Company, Inc., a wholesale lumber dealer in Charlotte, North Carolina. As security or collateral for all such loans and credits, the Lumber Company delivered and pledged to the Bank documents which purported to be copies of invoices representing accounts receivable due and

[1]Unless otherwise indicated, all page references are to the printed appendix to the plaintiff Bank's brief filed in the Court of Appeals, which appendix is now included in the record filed with this Court.

owing to the Lumber Company from its customers (22, 48).

From time to time, the Lumber Company made payments to the Bank and removed invoices which it had pledged to the Bank, obtained further loans and extension of credit, and delivered other and further invoices to the Bank.

During the early years of such borrowing and lending relationship, the invoices so pledged and delivered by the Lumber Company to the Bank were genuine and valid, but in later years the Lumber Company began to place with the Bank invoices which were false and fictitious, in that they did not represent any actual sales by the Lumber Company nor any actual accounts receivable due to the Lumber Company.

On August 14, 1959, as stated above, the Bank discovered that of the invoices which it then had on hand, pledged and delivered to it by the Lumber Company under the circumstances outlined above, a major portion thereof were thus false and fraudulent — purporting to represent transactions of sale and purchase as between the Lumber Company and its customers which in fact had never taken place. As a result, the Bank suffered a loss, the final amount of which — after every effort of collection and salvage — was, as stated above, $211,474.76.

Upon the Casualty Company's denying that the "Blanket Bond" in question covered this loss, the Bank instituted this suit in the United States District Court for the Western District of North Carolina. That Court had jurisdiction over the case by reason of diversity of citizenship as between the plaintiff and the defendant. 28 USC. § 1332.

By the decision of the Court below, the Bank, here petitioner, is still denied any recovery upon the bond for the loss which it has sustained.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

1. The decisions of a number of the United States Courts of Appeal are in direct and pointed conflict upon the question here at issue.

2. These conflicting decisions all involve the construction and application of the same bond provisions in the same circumstances which are presented by this case.

3. This recurring issue and the increasing conflict of decisions upon it should be put at rest by a decision from this Court.

4. The question here at issue is important in the administration of National banks, which are organized and operated under Federal law, 12 USC § 21 et seq., 12 USC § 1811 et seq. It directly affects the interests of stockholders, of depositors and of the general public doing business with these banks. It is an issue which should be resolved, and rightly resolved, instead of being allowed to proliferate into further uncertainty and litigation and conflict of decisions among the Federal Courts.

ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

The pertinent words of the bond here in question are brief —

"The losses covered by this bond are as follows:

"(E) Any loss through the insured's having . . . extended any credit . . . or otherwise acted upon any . . . documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker . . . or raised or otherwise altered or lost or stolen . . ."

There can be no doubt but that the documents or written instruments here involved — the purported duplicates of accounts receivable invoices — were false, fictitious and counterfeit and that the insured acted upon them to its loss.

In order for an instrument to be a "counterfeit," it is not necessary that it be a fraudulent reproduction of any particular genuine instrument.

> "An instrument may be a counterfeit notwithstanding it is purely fictitious, as where no note of such denomination has ever been issued."
>
> 14 American Jurisprudence — *Counterfeiting*, Section 2, p. 173

The Court below did not take issue with the proposition that these fraudulent invoices are properly to be termed "counterfeited." Instead, the Court, following its earlier decision in the case of *First National Bank of South Carolina vs. Glens Falls Insurance Company*, 304 F. 2d 866 (4th Cir.), took the view that the word "counterfeited" in the bond does not refer to general or total falsity in a document or written instrument but only to a falsity in a signature on such document or written instrument.

In other words, says the Court, the bond does not protect the insured against a document spurious in its entirety but only against a document spurious with respect to signature. Otherwise expressed, the Court's view is that the word "counterfeited" simply duplicates or repeats the word "forged" in the bond, and has no other meaning or scope, and that both words refer precisely to the same thing, namely, "signature."

It is submitted that in taking this view the Court has disregarded a fundamental principle of contract interpretation and has resolved doubt or ambiguity not in favor of the assured but in favor of the insurer.

The Court's decision makes the pertinent provision of the bond read:

> "... documents or other written instruments which prove to have been counterfeited (as to the signature) or forged as to the signature of any maker ..."

It is surely as reasonable to read this provision:

> "... documents or other written instruments which prove to have been counterfeited (documents or written instruments) or forged as to the signature of any maker ..."

The fair and sensible meaning is that the insurer was saying to the assured:

> "We will protect you against loss resulting from your relying on documents which prove to have been totally counterfeited and also against loss resulting from your relying on documents which prove only to have been forged as to signature."

Can it be said that a reading adverse to the assured and favorable to the insurer is beyond doubt or question the only fair and sensible reading? Must it not be conceded, at the very least, that doubt and question is reasonably possible as to which is the true and correct meaning?

And once it is conceded, as it must be, that there is room for reasonable doubt on the matter, the law immediately and positively resolves that doubt in favor of the assured. In virtually all jurisdictions this principle is given strong and controlling effect.

"The rule is settled that, in case of ambiguity, that construction of the policy will be adopted which is most favorable to the insured. The language employed is that of the company, and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

Mutual Life Insurance Co. vs. Hurn Packing Co., 263 U. S. 167, 174, 68 L. Ed. 235, 238, 44 S. Ct. 90.

"The phraseology of contracts of insurance is that chosen by the insurer . . . So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted."

Aschenbrenner, vs. United States Fidelity and Guaranty Company, 292 U. S. 80, 84, 78 L. Ed. 1137, 1140, 54 S. Ct. 590

"If the clause in question is ambiguously worded, so that there is an uncertainty as to its right inter-

pretation, or if for any reason there is doubt in our minds concerning the true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter . . ." This is the rule to be adopted for our guidance in all such cases, and one reason, at least, for it is that the Company has had the time and opportunity, with a view to its own interests, to make clear its meaning, by selecting with care and precision language fit to convey it, and if it has failed to do so, the consequences of its failure should not even be shared by the assured, so as to deprive him of the benefit of the contract as one of indemnity for his loss."

Underwood vs. The State Life Insurance Company, 185 N. C. 538, 540; 117 S. E. 790

"It is thoroughly established that if there be doubt as to the true meaning of the language used in an insurance policy, such policy should be construed against the Company, and all such doubts resolved against the insurer."

Jolly vs. Jefferson Standard Life Insurance Company, 199 N. C. 269, 271; 154 S. E. 400

Not only has the Court below disregarded this fundamental, but the construction which the Court has adopted violates other clear principles of contract interpretation, as well.

In the first place, it is readily to be seen that the reading which the Court has given to the pertinent provision converts the word "counterfeited" into useless verbiage and surplusage. For if "counterfeited"

refers not to "documents or other written instruments" but only to "signature," as "forged" unquestionably does, then the word "counterfeited" becomes a mere repetition of "forged" and the language of the bond becomes redundant. In other words, if, as the Court below holds, "counterfeited" means "counterfeited as to signature," then it simply says again what "forged as to signature" says. We thus have a bond reading, under the Court's view, essentially as follows:

> ". . . documents or other written instruments which prove to have been falsified as to the signature or falsified as to the signature . . ."

Is this the reasonable and proper reading of this bond — and is it such beyond all doubt or question? Certainly not. Yet this is exactly the reading which the Court below has given it.

> "No word in an insurance policy should be assumed to be superfluous, or treated as superfluous or redundant . . ."
>
> Couch on *Insurance*, 2d Ed., Section 15:43, p. 727

> "Again, it is a well settled rule of construction that effect must be given to each word, and that each word must be presumed to have a purpose."
>
> *American Central Life Insurance Company vs. American Trust Company*, 5 F. 2d 71, 73 (6th Cir.)

In order to prevent the word "counterfeited" from being surplusage — in order to give it a purpose and effect of its own — it must be accepted as referring

to false documents or written instruments and not to false signature. For the phrase "forged as to the signature" by itself clearly and sufficiently conveys the meaning of falsity in signature.

There is still another principle of legal and grammatical construction which is directly opposed to the lower Court's reading of this bond.

> "The rule that requires that a limiting clause or phrase which follows several expressions be restricted to the last antecedent governs in the interpretation of a contract of insurance."
>
> Couch on *Insurance*, 2d Ed.,
> Section 15:13

Thus, in accordance with this principle, the limiting and specifying phrase "as to the signature" is to be restricted to, and is to characterize only, the word which is its last and immediate antecedent, namely, the word "forged" and is not to reach back and attach to and characterize also the word "counterfeited."

When a purchaser is buying a bond such as this, involving hundreds of thousands of dollars in coverage, and paying what must be assumed to be very substantial premiums for it, surely he is entitled to rely upon the thought that everything the insurer has written into the bond counts; that words have not been put in merely to repeat each other; but that each has its own meaning and effect. Thus, here, was not the Bank entitled to assume that the conspicuous word "counterfeited" had significance; that it expressed and described a distinct bond coverage; and that it was not merely a repetition of a coverage already and otherwise created?

Surely the makers and issuers of insurance contracts and indemnity bonds are not to be allowed to avoid liability on the instruments they have written by contending that crucial words therein are mere flourishes of repetition and rhetoric. All principles of contract interpretation are to the contrary.

It is, furthermore, significant to note that at various other places in this bond the Casualty Company uses these same words "counterfeit" and "forged," and in none of these other instances does it use them as repetitive of the same thought — as the Court below has said is the case in Clause E.

Thus, in Clause D, the bond uses the word "forgery" twice, the phrase "forged signature," the word "forged," the phrase "forged endorsements" and the phrase "forged as to such endorsement" — without using the word "counterfeit" or "counterfeited" at all. In Clause G, we find the words "counterfeit" and "counterfeited" without any use of "forged" or "forgery." In Section 1(a), "forgery" is the word without any use of "counterfeit" or "counterfeited." In Section 1(f), "forged" is again twice employed without any semblance of repetition or assistance from any use of "counterfeit" or "counterfeited."

It is therefore obvious that in drafting this bond the Casualty Company used the words "counterfeit" and "forged" advisedly and separately, that when it intended to say one thing, it used the one and when it intended to say another thing, it used the other; and that it did not use these words as repetitive expressions of the same thing. How then could the Court below reasonably and consistently consider that in Clause E, "counterfeit" and "forged" are used repeti-

tively — both merely to express the idea of falsity "as to the signature"?

It is far more reasonable, and undeniably more consistent with the Casualty Company's usage of the same words elsewhere in the same bond, to give "counterfeited" its separate application, that is, to the phrase "documents or other written instruments" and to give "forged" its application to the phrase to which it is obviously attached, namely, "as to the signature."

The Court below suggested in the case of *First National Bank of South Carolina vs. Glens Falls Insurance Company*, supra, that if such separate coverages were intended, a comma would have been used after the word "counterfeited." Perhaps a comma would not have been inappropriate at this point, but it is not essential to the meaning for which the petitioner contends, and certainly its absence does not overcome the weight of all the other considerations which support an interpretation favorable to the petitioner.

Moreover, if clarity in a bond or insurance contract is claimed to consist in the absence of a comma, then it can hardly be said that such contract is clear and unambiguous.

Furthermore, any reliance upon the tenuous ground of the absence of a comma, is belied elsewhere in the same Clause E of the bond. For example, later in the Clause there appears the phrase "or raised or otherwise altered or lost or stolen." There is no comma between any of these words. Could it be denied, however, that "altered" and "lost" and "stolen" express and establish separate and distinct coverages under this bond? Yet there is no comma as the establishing of

liability moves from one to the other. Just as truly, no comma is essential for the provisions in question to establish two separate liabilities — a liability with respect to the counterfeiting of documents and a separate liability with respect to the forgery of signatures.

It is submitted that reason and common sense and basic principles of contract interpretation, alike, support the view that the word "counterfeited" in Clause E of this bond is not a repetitive and surplus modifier of "signature," but has a useful and purposeful application to "documents or other written instruments." *And if there be doubt about the matter, judgment must still be in favor of the assured* — and not in favor of the insurer, as the Court below has ruled.

Aligned on the petitioner's side of this contest are the United States Courts of Appeal for the Third Circuit and the Seventh Circuit. Thus the Court of Appeals for the Third Circuit, ruling diametrically opposite to the Court below upon the identical question as to the meaning of the same provisions of Clause E in the same standard "Bankers Blanket Bond," says:

> "Argument for the surety companies urges the point that the word 'or' between the word 'counterfeited' and the word 'forged' indicates the use of different terms to express the same thing. That means, necessarily, that the word 'counterfeited' could just as well be left out for it adds nothing to the term 'forged.'
>
> "We do not think this is the best construction of the instrument. The form was offered as a contract

by large professional surety companies who certainly know what they are doing. We cannot think that it has not been very carefully drafted or that the draftsman put in words to mean nothing."

Fidelity Trust Company vs. American Surety Company of New York, 268 F. 2d 805, 807 (3rd Cir.)

Specifically to the contrary are the decision of the Court below in the present case and its earlier decision in the case of *First National Bank of South Carolina vs. Glens Falls Insurance Company*, supra. The Court below also cites, as being in agreement with its construction of Clause E of this bond, the case of *State Bank of Poplar Bluff vs. Maryland Casualty Company*, 289 F. 2d 544 (8th Cir.)

The appositeness of this latter decision is doubtful, however, since it went off entirely on the basis of Missouri law. The Court, in denying recovery upon Clause E, said:

"Missouri law governs . . . we are concerned only with whether the Trial Court's holding . . . was a permissible conclusion under Missouri law."

The Eighth Circuit Court did not even take the position that the Trial Court's interpretation of the bond was the best interpretation, but simply that it was a "permissible" interpretation under the law of Missouri. The Court distinguishes cases which have ruled in favor of coverage under Clause E upon the ground that they did not "involve Missouri law."

Ruling in favor of recovery under Clause E of the same bond and upon the same factual situation as

is now presented, the Court of Appeals for the Seventh Circuit held, in *Security National Bank of Durand vs. Fidelity and Casualty Company of New York*, 246 F. 2d 582 (7th Cir.), that the purported accounts receivable invoices are "forged as to the signature." In that case, as in the present case, the signature of the borrowing Company was typed or stamped onto the face of the false accounts receivable invoices and this signature was completed by an officer of the Company signing his name above his corporate title. In holding that the words of Clause E "forged as to the signature" applied to and covered this very situation, the Court quoted from its earlier ruling in the *Quick Service Box Co. vs. St. Paul Mercury Indemnity Co.*, 95 F. 2d 13 (7th Cir.) in which it had ruled that:

> "To constitute forgery there must be a false making; that this might be accomplished by the fraudulent application of a false signature to a true instrument or a real signature to a false instrument; and that the essence of forgery is an intent to injure or defraud at the time the action complained of is done."
>
> *Security National Bank of Durand vs. Fidelity and Casualty Company of New York*, 246 F. 2d 582, 585 (7th Cir.)

To the same effect is the decision in *Provident Trust Company vs. National Surety Corporation*, 138 F. 2d 252 (3rd Cir.)

In North Carolina, where the bond in question was executed and delivered, it is definitely held that if one places his own signature upon a written instrument in a context of misrepresentation and fraud, and for the purpose of defrauding, he is engaged in forgery.

"False pretense and forgery are closely akin, both belonging historically to the family of offenses known to the common law as 'cheats' and now so classed. False pretense is the heart of forgery . . . the gist of forgery still is fraud."

"There is then no logical reason whatever that we can see that would confer immunity from the charge of forgery upon a person who signs his own name . . . with fraudulent intent . . ."

"The general holding is that when designated and used as an instrument of fraud, the act is forgery . . ."

Peoples Bank and Trust Company vs. The Fidelity and Casualty Company of New York, 231 N. C. 510, 519, 520; 57 S. E. 2d 809

So, in the present case, when the Lumber Company's signature was typed or stamped onto the false and fictitious accounts receivable invoices and the Company's signature was completed by an officer of the Company filling it in with his signature as a corporate official, the entire transaction being the perpetration of a fraud, there *was* a forgery of the corporate signature.

Here again, however, the clear holding of the Seventh Circuit in the case of *Security National Bank of Durand vs. Fidelity and Casualty Company of New York*, supra, that Clause E is in any event to be construed as permitting recovery in the instant situation on the ground that forgery is here present, is contradicted by the Court of Appeals for the Ninth Circuit in *Torrance National Bank vs. Aetna Casualty*

and Surety Company, 251 F. 2d 666 (9th Cir.) and by the Court of Appeals for the Sixth Circuit in *First National Bank of Memphis vs. Aetna Casualty and Surety Co.*, 309 F. 2d 702 (6th Cir.). Indeed the Court of Appeals for the Sixth Circuit holds that the fictitious documents relied upon are, in its view of Clause E, neither "counterfeited" documents nor are they documents "forged as to signature."

Thus it is to be seen that the Federal Courts of Appeal are in hopeless and increasing conflict as to the meaning of Clause E of this standard "Bankers Blanket Bond." This conflict can be resolved only by this Court. In the interest of the proper administering of the National banks of the country and in the interest of their owners, depositors and the general public doing business with them, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

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APPENDIX

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 8812.

North Carolina National Bank,
Appellant,

versus

United States Casualty Company,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE: WILSON WARLICK, DISTRICT JUDGE

(Argued January 16, 1963. Decided May 20, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and J. SPENCER BELL, Circuit Judges.

Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellant, and John H. Anderson and Guy T. Carswell (Smith, Leach, Anderson & Dorsett; James F. Justice, and Carswell & Justice on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

Under its "Bankers Blanket Bond" the Bank seeks to recover from the casualty company the amount of a large loss it suffered on a loan purportedly secured by accounts receivable, which, in fact, did not exist. It does so on the theory that copies of invoices deposited with and assigned to the Bank as evidence of the receivables were counterfeited within the meaning of the indemnity bond, because though issued and assigned by authorized officials of the debtor, the invoices were intrinsically false in their representation that goods had been sold and delivered.

Relying upon our recent decision in First National Bank [illegible] the District Court held that the bond afforded no [illegible] of South Carolina v. Glens Falls Ins. Co., 4 Cir., 304 F. 2d coverage under the circumstances of this case. On appeal, the Bank's essential position is that we should reconsider our decision of less than a year ago, or, at least, hold that it is inapplicable under the laws of North Carolina. We find no possible distinction between the two cases and no significant difference between the laws of North Carolina and those of South Carolina which governed our decision in the First National Bank of South Carolina case. We adhere to our earlier decision.

For many years C. K. Callaham and Sons Lumber Company, of Charlotte, North Carolina, had a line of credit with a predecessor of the plaintiff Bank. The Callaham loans were secured by an assignment of the accounts receivable represented by specific, duplicate invoices deposited with the Bank and assigned to it. Until sometime before 1950 Callaham's debtors were notified of the assignment and were instructed

to remit to the Bank, but the notification procedure was then abandoned. Thereafter, Callaham's customers were not notified when their accounts were assigned by Callaham, and they remitted direct to Callaham. However, the Bank regularly reviewed Callaham's financial statements and its customer ledger accounts, and by such means acquired assurance that Callaham did have a substantial volume of business, a substantial volume of outstanding receivables, and that the invoices, copies of which were deposited with it, represented actual, outstanding receivables.

In the 1950's after J. W. Callaham had become the principal officer of the lumber company, its business began to decline. He began to include in the assignments to the Bank some duplicate invoices representing fictitious transactions. He caused the preparation of invoices, regular in all respects except that the transactions they purported to represent had not occurred. He would destroy the original of each such invoice, deposit one duplicate copy with the Bank and file another copy in his customers' account filed. The purported transaction would then be recorded on the lumber company's customer ledger sheets, and it was reflected in the lumber company's annual and other statements submitted to the Bank. As time went on, the proportion of such fictitious accounts to collectible accounts increased, with the result that when the lumber company's house finally collapsed approximately three-fourths of the accounts assigned to the Bank were fictitious and uncollectible.

When Callaham's deceit came to light, the Bank held a collateral note of the lumber company in the amount of $300,000. Attached to the note was a list

of accounts receivable and duplicate invoices which were in accord with the list. In a collateral note agreement, the lumber company represented that each of the assigned accounts was genuine and outstanding in the amount shown, and that there were no setoffs or charge backs. At the time of discovery, the Bank held accounts, fictitious and valid, aggregating $414,017.10, and the lumber company's indebtedness to the Bank was $291,397.39. Thereafter, the Bank received payments on valid accounts receivable and dividends from the Trustee in Bankruptcy of the lumber company. Such receipts reduced its loss to $211,474.76, which is the amount it seeks to recover from the casualty company.

The indemnity bond here is identical in all respects to that which we considered in the First National Bank of South Carolina case. In the part essential here, it provided coverage for "Any loss through the Insured's having, in good faith and in the course of business * * * given any value * * * on the faith of * * * any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer * * * or as to the signature of any person signing in any other capacity * * *."

Among the exclusions, however, it provided:

"THIS BOND DOES NOT COVER:

"* * *

"(d) Any loss the result of the complete or partial non-payment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through trick, artifice,

fraud or false pretenses, except when covered by Insuring Clause (A), (D) or (E)."

In First National Bank of South Carolina v. Glens Falls Ins. Co., 304 F. 2d 866, we held that invoices which were fictitious because of falsity of their implicit representation that a corresponding, collectible account receivable existed were not "counterfeited or forged as to the signature" of anyone. In dealing with the contention there that the word "counterfeited" was not qualified by the words "as to the signature," we said:

"In our judgment the limitation cannot be ignored. It is familiar law in South Carolina and elsewhere that the terms of an insurance contract must be construed in favor of the insured and against the insurer where the words of the policy are ambiguous, but where there is no ambiguity a contract of insurance, like other contracts, must be construed according to the plain and ordinary meaning of its terms. Pitts v. Glens Falls Indemnity Co., 222 S.C. 133, 72 S.E. 2d 174; Quinn v. State Farm Mut. Automobile Insurance Co., 238 S. C. 301, 120 S.E. 2d 15. The meaning of the contract in the case at bar seems to us to be plain. Protection is afforded to the insured against loss incurred by extending credit on a written instrument that is found to have been counterfeited or forged as to signature. There is no comma after the word 'counterfeited' and no other indication that the phrase does not qualify both terms of evil import; and there is positive indication that it is the counterfeited or forged signature to the fraudulent document rather than false statements in the document or the falsity of the doc-

ument in its entirety which alone gives rise to the liability of the insurer. Thus, there is reference in the bond after the words 'counterfeited or forged' to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor, or as to the signature of any person signing in any other capacity. Obviously, counterfeited as well as forged written instruments may be signed and we do not think that it can fairly be said that this list of persons refers only to forgeries and not to counterfeits. Also included in the section is a clause as to loss incurred by relying on written documents which prove to have been 'raised or otherwise altered or lost or stolen.' As to these no mention of the signature is made, thus creating a special class of documents which may give rise to liability whether the signature is genuine or not. The omission of the phrase, as to the signature, in describing this class of documents and the inclusion of the phrase in the description of the documents first mentioned above is worthy of note. Immediately following it the clause insuring against loss incurred through the insured having guaranteed or witnessed a signature, again demonstrating the emphasis placed by the draftsman on the signature rather than on the contents of the writing, or its falsity as a whole. At the end of Section (E) of the bond it is provided that mechanically reproduced facsimile signatures are treated the same as handwritten signatures and no reason appears why this more liberal provision should be applied to forged but not to counterfeited instruments. Finally, there is the significant exclusion clause that losses which result from the non-

payment of a loan obtained by fraud or false pretenses are not covered by the bond. This provision obviously shows that the bond is not intended to cover losses incurred through reliance on false pretenses generally unless the fraud is accomplished by the use of a counterfeited or forged signature."

Most of the courts which have considered the problem in the same, or a similar, context have reached a similar conclusion.[1] Two courts have come to the opposite conclusion. The Court of Appeals for the Third Circuit has held that such invoices were counterfeited within the meaning of the bond when the transactions they purported to represent never took place,[2] while the Court of Appeals for the Seventh Circuit has held that under similar circumstances such duplicate invoices were forged.[3] In First National Bank of South Carolina, however, we pointed out that the Third Circuit had not considered the qualifying phrase, "as to signature," and we expressly declined to follow its lead. The cases in the Seventh Circuit were cited in Footnote 1 of the opinion in the First National Bank of South Carolina case, but they were not extensively

[1] First Nat. Bank of Memphis v. Aetna Casualty & Surety Co., 6 Cir., 309 F. 2d 702; United States Fidelity & Guaranty Co. v. First Nat. Bank of Ft. Morgan, Colo., 364 P. 2d 202; State Bank of Poplar Bluff v. Maryland Casualty Co., 8 Cir., 289 F. 2d 544; Torrance Nat. Bank v. Aetna Casualty & Surety Co., 9 Cir., 251 F. 2d 666; Pasadena Investment Co. v. Peerless Casualty Co., 132 Cal. App. 2d 328, 282 P. 2d 124; Fitzgibbons Boiler Co. v. Employers' Liability Assurance Corp., 2 Cir., 105 F. 2d 893.

[2] Fidelity Trust Co. v. American Surety Co. of New York, 3 Cir., 268 F. 2d 805; and see Provident Trust Co. v. National Surety Corporation, 3 Cir., 138 F. 2d 252.

[3] Security National Bank of Durand v. Fidelity and Casualty Company of New York, 7 Cir., 246 F. 2d 582; and see Quick Service Box Co. v. St. Paul Mercury Indemnity Co., 7 Cir., 95 F. 2d 15.

discussed, for there was no contention there that the invoices were "forged as to signature."

Here, there is such a contention. It is founded upon the fact that all of the duplicate invoices deposited with the Bank bore a form of assignment and notice to the purported customer to remit to the Bank. Such notices of assignment had been affixed to all original invoices during the period when the notification procedure had been followed by the Bank and the lumber company. Such assignments and notices had been omitted from all original, valid invoices after the notification procedure was abandoned. For some reason, however, Callaham continued to affix such legends upon the duplicate invoices deposited with the Bank, and, in most instances, these were actually signed by J. W. Callaham for the lumber company.

Falsity here did not reside in the assignment, however. The falsity lay in the implicit misrepresentation made to the Bank when the lumber company deposited with the Bank the duplicate invoices. Certainly as the term "forgery" is commonly understood, the fact that an instrument contains a false representation does not lead to the conclusion that the instrument is forged or "forged as to signature." The negotiator of a worthless check bearing his signature represents that he has on deposit sufficient funds with which the check may be paid, but, when he affixes his own signature to the worthless check and does not represent himself to be another, his crime is distinct from that of the forger.[1] Moreover, here, the assign-

[1] See Greathouse v. United States, 4 Cir., 170 F. 2d 512, 514; United States v. Brown, 2 Cir., 246 F. 2d 541; Marteney v. United States, 10 Cir., 216 F. 2d 760; Goucher v. The State of Nebraska, 113 Neb. 352, 204 N.W. 967; United States v. Mulligan, 2 Cir., 59 F. 2d 200.

ments and the execution of the assignments were quite unnecessary, for the deposit of the duplicate invoices under the loan agreement was quite sufficient, *inter sese*, for the transfer to the Bank of the rights of the lumber company in the receivable the duplicate invoice represented or purported to represent. In North Carolina, it has been held that falsification of a signature is not forgery, unless the signature is necessary to the validity of the instrument or the effectuation of the transaction.*

Of course, the lumber company and its officer, Callaham, were guilty of gross misrepresentation and of false pretense, but losses upon loans secured by such means are not within the coverage of the bond. The deposit of the duplicate invoice carried with it the implicit representation that the customer whose name appeared thereon had ordered goods which the lumber company had delivered or shipped, that the purchase price was the amount which appeared upon the invoice, that the purchase price had not been paid, and that the customer had no offsetting claim against the lumber company. These same representations were contained in more explicit form in the loan agreement, though the Bank, and apparently no one else, has suggested that the loan agreement, on that account, is counterfeited or forged as to signature. The financial statements which the lumber company filed with the Bank and upon which the Bank relied were equally false, for they included in reported accounts receivable all of these spurious transactions. The ledger sheets which reflected these fictitious transactions, which the Bank inspected and

* State v. Gherkin, 29 N. C. 206.

upon which the Bank relied, were similarly false, but no more can be said of any of these instruments, including the duplicate invoices, than that they were all part of the scheme of misrepresentation of the lumber company's sales and outstanding receivables. All of them were clearly the acts of Callaham and of the lumber company, and there was no misrepresentation of the person, or persons, responsible for them. The duplicate invoices, as the other writings used to effect and maintain the misrepresentation, cannot be said to have been "counterfeited or forged as to signature."

The papers by which such misrepresentation were effectuated, having no intrinsic value in themselves and being non-negotiable, are not the usual subject of counterfeiting or forgery. When they are fictitious only in the sense that they contain an implicit or explicit representation that a valid, collectible, but uncollected, receivable exists, it is very doubtful, whatever writing appeared upon them, they could be held to be the subject of counterfeiting or forgery so long as the writing did not misrepresent their origin. From the point of view of the Bank, a duplicate invoice would be equally false, though the original was properly issued in connection with a real transaction; if, at the time the duplicate was deposited with the Bank, the lumber company had already received payment or if the lumber company knew that the customer had some effective offsetting claim or credit, but such falsity would hardly lead to a contention that the duplicate invoice was counterfeited. The deposit of the duplicate invoices is simply an implicit particularization of the explicit representations contained in the loan agreement, and the implicit particulariza-

tion is a falsehood unless it is true in all respects. Whether, at the time the duplicate invoice is deposited with the Bank, it be false in one respect or another, it is simply an act of misrepresentation and is not the transfer of a writing which may be said to have been "counterfeited or forged as to signature," if those words are given their usual meaning.

Finally, the Bank refers to the general rule that insurance contracts are construed against their authors. It suggests that the rule is applied more stringently in North Carolina than in South Carolina, whose laws governed our decision in the First National Bank of South Carolina case. We can perceive no difference in the application of the rule in the two states, however. As in South Carolina, it is settled in North Carolina that insurance contracts are to be construed as other contracts, and that, in the absence of ambiguity, the terms are to be given their usual and ordinary meanings, the objective being to discover and enforce the real intention of the parties.[*]

We find no distinction between this case and that which was so recently before us in First National Bank of South Carolina v. Glens Falls Ins. Co., and no reason for holding inapplicable here the conclusion we reached there.

Affirmed.

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[*] Powers v. Travelers' Company, 186 N.C. 319, 119 S.E. 481; McCain v. Hartford Live Stock Ins. Co., 190 N.C. 549, 130 S.E. 186; Bailey v. Life Ins. Co. of Virginia, 222 N.C. 716, 24 S.E. 2d 614; Ford v. New York Life Ins. Co., 222 N.C. 154, 22 S.E. 2d 235; Bolich v. Provident Life & Accident Ins. Co., 205 N.C. 43, 169 S.E. 826; McDaniel, Administratrix, v. Imperial Life Insurance Company, 243 N.C. 275, 90 S.E. 2d 546; Marshall v. Washington National Insurance Co., 246 N.C. 447, 98 S.E. 2d 345.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

3354

On Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION AND APPENDIX

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. .....

NORTH CAROLINA NATIONAL BANK,
Petitioner,

vs.

UNITED STATES CASUALTY COMPANY,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

This action was tried in the District Court for the Western District of North Carolina to the Court without

a jury, following which judgment was rendered in favor of the defendant based upon the findings and opinion reported at 208 F. Supp. 452. On appeal to the United States Court of Appeals for the Fourth Circuit, the judgment of the District Court was affirmed in an opinion reported at 317 F. 2d 304, which is printed as an appendix to the Petition herein.

QUESTION PRESENTED

Petitioner's statement of the question presented for review assumes that an ambiguity exists in the wording of the bond sufficient to afford an indemnity thereunder, whereas the terms of the bond are not ambiguous, as held by the Court of Appeals in this and its earlier decision, and as held by six other appellate courts.

The question presented by this case is whether or not plaintiff's losses from the failure of its borrower to repay loans of money are covered by Clause (E) of the bond (reprinted as appendix hereto) which insured plaintiff against any loss resulting from its having extended credit "on the faith of . . . securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer . . . or as to the signature of any person signing in any other capacity . . ."

STATEMENT OF THE CASE

In this action, the plaintiff, petitioner, sought to recover upon an indemnity bond issued by the defendant to a predecessor corporation of the plaintiff, losses sustained by reason of the failure of C. K. Callahan and Sons Lum-

ber Company to repay loans made to the Lumber Company over a period of about nine years. To secure the payment of such loans, the Lumber Company had assigned accounts receivable, two-thirds of which were non-existent.

In its complaint, petitioner alleged that its losses resulted from the making of loans in reliance upon duplicate invoices representing accounts receivable which "proved to have been *counterfeited*" (Complaint paragraphs 9, 11, and 12, pages 5 and 6 of appendix to plaintiff's brief in the Circuit Court), and that its losses were therefore covered by Clause (E) of the bond.

In its complaint and in the trial court, petitioner did not contend that the duplicate invoices involved were "forged as to the signature".

The trial Court rendered its decision in favor of the defendant based upon the recent decision of the Fourth Circuit Court of Appeals in the case of *First National Bank of South Carolina* vs. *Glens Falls Insurance Company*, 4th Cir., 304 F. 2d 806, in which the Court held that similar fictitious invoices were not "counterfeited or forged as to the signature" of any person and were not within the coverage of Clause (E) of an identical bond.

Thereafter, in its brief on appeal to the Court of Appeals, the petitioner advanced for the first time the argument that under the law of North Carolina the plaintiff's losses are covered by the words "forged as to the signature" appearing in Clause (E) of the bond sued upon.

The Court of Appeals affirmed the judgment of trial court in an opinion in which another panel of Circuit Court Judges adhered to its earlier decision in the First National

Bank of South Carolina case, and discussed and rejected all arguments advanced by petitioner.

The facts herein involved are very aptly summarized and stated throughout the opinion of the Court of Appeals, set forth as an appendix to the petition. For emphasis and an additional statement, we call attention to the following facts:

The plaintiff seeks to recover only upon the provisions of Insuring Clause (E) of the bond reading in part as follows:

> "(E) SECURITIES—Covering:—Any loss through the insured's having in good faith and in the course of business . . . given any value or extended credit . . . on the faith of . . . any securities, documents, or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, or as to the signature of any person signing in any other capacity . . .".

The full text of Clause (E) of the bond is reprinted as an appendix hereto.

In addition, the bond provided under "EXCLUSIONS—Section 1", the following:

> "THIS BOND DOES NOT COVER:
>
> "(d) Any loss the result of the complete or partial non-payment of or default upon any loan made by or obtained from the insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clauses (A), (D), or (E)".

In the years before 1950, petitioner made loans to the C. K. Callaham and Sons Lumber Company, of Charlotte, N. C., hereinafter referred to as the "Lumber Company", secured by the assignment of various accounts receivable owed the Lumber Company. The loans were evidenced by various promissory notes in which the Lumber Company assigned to the bank several specified and described accounts receivable. In these early years, the customers of the Lumber Company whose accounts were assigned were notified of the assignment of the account and were requested to remit payment thereof direct to the bank. Such a notification appeared in a typed notice on the original invoice which was sent to the customer of the Lumber Company, which notice read:

> "For value received, this account has been assigned to the American Commercial Bank, Charlotte, N. C. to whom please remit.
>
> C. K. Callaham and Sons Lumber Company
>
> By. .....
>
> President"

Sometime before 1950, the practice of notifying customers of the Lumber Company of the assignments was discontinued, and the accounts assigned were thereafter paid to the Lumber Company, which deposited payments in its own checking account at the plaintiff bank. Duplicate copies of invoices for these accounts were delivered to the Bank. As pointed out by the Court of Appeals, "the Bank regularly reviewed Callaham's financial statements and its customer ledger accounts, and by such means acquired assurance that Callaham did have a substantial volume of business, a substantial volume of outstanding receivables

and that the invoices, copies of which were deposited with it, represented actual outstanding receivables."

Sometime in 1950, after J. W. Callaham succeeded his father as President and in the active management of the Lumber Company, business began to decline, and J. W. Callaham began assigning to the bank non-existent accounts receivable which he had fabricated. As testified to by J. W. Callaham, he would prepare or have his secretary type up invoice or purchase orders on his company forms, destroy the original or ribbon copy of the invoices, and attach a duplicate copy of the invoice to a new collateral note specifying the assignment of such accounts to secure payment of the note. These fictitious accounts receivable were entered upon a ledger page of the ledger book of the Lumber Company in every detail similar to its genuine accounts receivable, and were reflected in its record of sales and in the financial statements given the bank each year. The second carbon copy of the invoice was placed in the customer's folder in the Lumber Company office.

Notwithstanding the discontinuance of the practice of notifying the customers of the Lumber Company that the accounts had been assigned to the Bank, the Lumber Company continued to place on the duplicate copies of the invoices the above notation. On 100 of the duplicate invoices herein involved, this notation appeared and was signed by J. W. Callaham as President and Treasurer of the Lumber Company. (Appellant's appendix page 10). On the other 14 duplicate invoices herein involved, there was an unsigned notation that the account had been assigned to the Bank to secure a loan. The purpose served by these notations, which did not appear on the original invoices after 1950, was not explained.

The books and records of the Lumber Company were inspected at periodic and irregular intervals of time by the officers and representatives of the plaintiff bank for the purpose, as they testified, of determining that the assigned accounts were genuine and outstanding as represented by J. W. Callaham. These officers testified that they relied upon the ledger accounts, the oral statements and representations of Callaham and his bookkeeper, the sales records, and the yearly financial statements, as indications that the assigned accounts receivable were genuine.

The means by which Callaham practiced his fraud and by which the Bank was misled was shown by the testimony of the witness Cooper, Senior Vice-President of plaintiff bank set forth on pages 59-66 of the appendix to defendant's brief filed with the Court of Appeals. There Mr. Cooper testified that statements prepared by officer's of borrower's "are accepted for credits"; that the bank officials carefully examined and analyzed the financial statements furnished the bank by Callaham to determine the financial condition of the Lumber Company, and that these statements showed the existence of large amounts of genuine accounts receivable. He stated that the Bank made inquiries concerning the credit standing of the customers whose accounts had been assigned *"in order to satisfy ourselves that we were accepting invoices of companies in existence* and companies that had credit ratings with their banks". (appx. p. 60) He further stated that the Bank required its borrower to keep records showing the sales it made, that Callaham kept such records in the form of general sales records and a ledger account or page for every account receivable assigned to the bank, and that each such ledger page, for both genuine and fictitious accounts contained a record of sales, deliveries, and other

entries, "showing activity, credits and debits". Mr. Cooper also testified that Callaham's bookkeeper told him the assigned accounts were genuine when he periodically gave him an "aging" of the accounts assigned, but that he still checked his records *"to see that we had genuine accounts, to see that they were accounts receivable"* (ibid. appdx. p. 63).

Finally, Mr. Cooper testified:

"A. The loans were based on the company's own representation of its financial condition.

Q. And the representation that the accounts receivable were genuine and actually in existence?

A. Yes, as borne out by their records, by their ledger records.

Q. And as borne out the representation of J. W. Callaham himself?

A. Yes." (ibid. appdx. p. 63).

To complete the masquerade, Callaham, upon the occasions of Mr. Cooper's personal visits to his office, would be found busily engaged in taking or pretending to take telephone orders, giving Mr. Cooper the impression that he was going great guns with the business.

On July 1, 1959, as the result of some new procedure established by the bank, all of the promissory notes of the Lumber Company were consolidated into one collateral note of $300,000, secured by the assignment of the various accounts receivable *specified in a list attached thereto*, which were assigned to the bank in accordance with the terms of a collateral loan agreement executed by the Lumber

Company. In part, this agreement provided that by the assignment of each account receivable, the Lumber Company represented to the bank that each account was genuine and outstanding in the amount shown and specified for each account, that there were no set-offs or chargebacks, and that no other amount should be credited to the account. These were the same representations which J. W. Callaham had made with respect to each account receivable it had previously assigned to the bank.

The assignment of the specified accounts receivable was completed when this note and loan agreement was executed, with the list of accounts attached thereto. Callaham continued to deposit with the Bank copies of invoices representing, or which he stated represented, the accounts assigned, on which appeared the "notification" of assignment which had previously been placed on the original invoices sent to the customers.

On August 14, 1959, an official of one of the firms the account of which had been assigned to the plaintiff, who happened to be in the bank, was asked about his account with the Lumber Company which appeared to be past due. Upon this inquiry, the Bank discovered that no such account was due the Lumber Company, which led to further inquiry of J. W. Callaham and the discovery of the fact that three-fourths of the accounts pledged to the Bank by the Lumber Company were fictitious. The total amount of all accounts receivable assigned the Bank at that time was $414,017.10, and the total indebtedness of the Lumber Company to the Bank was $291,397.39. After crediting collections of valid accounts receivable and dividends from the trustee in bankruptcy of the Lumber Company, a total

loss of the Bank was reduced to $211,474.70, which is the final amount claimed by plaintiff in this action.

SUMMARY OF REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. This Court has recently declined to review the question here presented in *First National Bank of Memphis* vs. *Aetna Casualty and Surety Company*, 6 Cir. 306 F. 2d 702, certiorari denied, March 25, 1963, 372 U. S. 953, 9 L. Ed. 2d 977, 83 S. Ct. 951.

2. No embarrassing conflict exists between the decisions of the United States Courts of Appeal upon the question here presented which requires resolving by a decision of this Court.

3. The decision of the Third Circuit upon which petitioner relies, *Fidelity Trust Company* vs. *American Surety Company of New York*, 288 F. 2d 805 (1961), was against the weight of authority when rendered, namely, *Torrance National Bank* vs. *Aetna Casualty & Surety Company*, 6 Cir., 252 F. 2d 699; *Pasadena Investment Company* vs. *Peerless Casualty Company*, 132 Cal. App. 2d 328, 282 P. 2d 124; *Fitzsimmons Boiler Company* vs. *Employers Liability Assurance Corp.*, 2 Cir., 105 F. 2d 893. The decision in the Fidelity Trust Company case has been subsequently rejected by the Sixth and Eighth Circuit Courts of Appeal, by the Fourth Circuit in 1962 and in the instant case and by the Supreme Court of Colorado. *First National Bank of Memphis* vs. *Aetna Casualty & Surety Company*, 6 Cir., 306 F. 2d 702; *State Bank of Fond du Lac* vs. *Maryland Casualty Company*, 8 Cir., 288 F. 2d 44; *United States Fidelity & Guaranty Company* vs. *First National Bank*

of Fort Mountain, (1961) 147 Cal. App. 2d 440, 304 P. 2d 202. *First National Bank of South Carolina vs. Greenville Falls Ins. Company*, 4th Cir. 1962, 304 F. 2d 880, Opinion of Court of Appeals herein, printed as Appendix to petition.

4. Petitioner's contention as to "forged as to the signature of" involved the correctness of the Court of Appeal's interpretation of North Carolina law which should not be reviewed by this Court. The decision of the Seventh Circuit upon which petitioner relies, *Second National Bank of Durand vs. Fidelity and Casualty Company*, 246 F. 2d 582 (1957), was based upon a prior local decision which represents a minority view of the law of forgery. Such is not in accord with the law of North Carolina relating to forgery. The reasoning of this decision was rejected by the Third Circuit in the Fidelity Trust Company case, *supra*, and by all of the other Courts which have considered the question involved.

5. The additional facts appearing in the instant case and the clarity and cogency of the opinion of the Court of Appeals herein resolve any doubt as to the question presented.

6. This action involves a private dispute between private parties, the provisions of which are subject to change by the parties, and petitioner's claim as a National Bank which was acquired after the discovery of the losses by plaintiff's predecessor is not relevant.

7. The rule of construction by which the rights of the parties to this North Carolina contract are to be determined is well settled by the decisions of the North Carolina Supreme Court and of this Court.

In its complaint the plaintiff, petitioner, based its cause of action upon the sole contention that the duplicate invoices were "counterfeited", and plaintiff in the trial court based its case entirely upon the decision in Fidelity Trust Co. v. American Surety Company, *supra*. In its brief to the Court of Appeals petitioner, for the first time, also contended it had coverage "In view of the bond which reads: —Forged as to the signature". Both contentions are advanced by petitioner in its petition to this Court.

For the convenience of the Court, and at the risk of repeating the reasoning of the Court of Appeals, which we would not presume to attempt to improve upon, and the arguments set forth in our brief in the Court of Appeals, we have collated and discussed hereinafter the authorities and facts supporting our reasons why the petition should not be granted.

ARGUMENT AMPLIFYING REASONS WHY A WRIT OF CERTIORARI SHOULD NOT BE GRANTED

This Court has recently declined to review the same question here presented.

This Court on March 25, 1968, declined to review the same question herein involved in *The First National Bank of Memphis vs. The Aetna Casualty and Surety Company, supra*.

In the Bank of Memphis case, the Sixth Circuit Court of Appeals held that warehouse receipts which were signed by the warehouseman purporting to represent Soya beans which did not in fact exist in the warehouse were covered

by the terms of Clause (E) of the identical bond herein sued upon, stating in its opinion with reference to this point as follows:

> "In our opinion, the warehouse receipts were not forged or counterfeited. They were signed and issued by the elevator company and endorsed by Butler-Foster, all by duly authorized officers. Falsity lies in the representation of facts contained in the warehouse certificates and not in the genuineness of their execution. In common parlance, the warehouse certificates would not be considered as forged or counterfeited and certainly not at common law or under the statutes of Alabama or Tennessee."

In its opinion in that case, the Sixth Circuit Court of Appeals cited with approval the many decisions hereinafter discussed supporting its interpretation of the Bankers Blanket Bond involved, and pointed out that the decisions relied on by petitioner herein stand alone and rejected by all other courts which have considered the question, including the Fourth Circuit in *First National Bank of South Carolina* v. *Glens Falls Ins. Co.*, *supra*.

Thereafter, the Fourth Circuit Court of Appeals rendered its opinion in the instant case in an opinion, the clarity and cogency of which should remove any vestige of uncertainty as to the law upon the question here involved.

In its petition to this Court for a Writ of Certiorari, the First National Bank of Memphis stated:

> "There is a conflict between this decision of the Court of Appeals for the Sixth Circuit and the earlier decision of the Court of Appeals for the Third

Circuit. This conflict is regarding a matter of great importance to all National Banks, Federal Savings and Loan Associations, as well as other banking institutions insured by Bankers Blanket Bonds or similarly worded bonds."

The same contentions are advanced with less validity in the petition in the instant case. The warehouse receipts involved in the Bank of Memphis case constituted documents which purported to be of legal significance and intrinsic value because they obligated the signing warehouseman to produce upon their presentment the Soya beans they represented. The papers herein involved called duplicate invoices were nothing more than purported carbon copies of bills or statements of account of the Lumber Company to its customer, unaccepted and unacknowledged by the customer, which obligated no person and possessed no legal or intrinsic value, and which was not even accepted by the plaintiff Bank as proof of the existence of the accounts indicated thereon.

Therefore, for even stronger reasons than existed in the Bank of Memphis case the petition herein should also be denied.

Clause (E) of the bond covers only documents which are counterfeited as to signature of a maker or person signing in any other capacity, which does not include the duplicate invoices in question.

The terms of Clause (E) of the bond upon which plaintiff relies are not ambiguous. The petitioner has heretofore argued that these provisions are plain and entitled it to recover because the [illegible] counterfeited

should not be held to be modified by the phrase "as to the signature of" in the first sentence of Clause (E).

The Court of Appeals in its opinion herein answered and laid to rest for all time this contention in the following language:

> "In First National Bank of South Carolina v. Glens Falls Ins. Co., 304 F. 2d 806, we held that invoices which were fictitious because of falsity of their implicit representation that a corresponding, collectible account receivable existed were not 'counterfeited or forged as to the signature of anyone.' In dealing with the contention there that the word 'counterfeited' was not qualified by the words 'as to the signature,' we said:
>
> > "In our judgment the limitation cannot be ignored. It is familiar law in South Carolina and elsewhere that the terms of an insurance contract must be construed in favor of the insured and against the insurer where the words of the policy are ambiguous, but where there is no ambiguity a contract of insurance like other contracts, must be construed according to the plain and ordinary meaning of its terms. Pitts v. Glens Falls Indemnity Co., 222 S.C. 133, 72 S.E. 2d 174; Quinn v. State Farm Mut. Automobile Insurance Co., 258 S.C. 301, 120 S.E. 2d 15. The meaning of the contract on the face of it that seems to us to be plain. Protection is afforded to the insured against loss incurred by extending credit on a written instrument that is found to have been counterfeited or forged as to the signature. There is no comma after the word 'counterfeited' and no other indication that the clause was not

qualify both terms of evil import; and there is positive indication that it is the counterfeited or forged signature to the fraudulent document rather than false statements in the document or the falsity of the document in its entirety which alone gives rise to the liability of the insurer. Thus, there is reference in the bond after the words 'counterfeited or forged' to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor, or as to the signature of any person signing in any other capacity. Obviously, counterfeited as well as forged written instruments may be signed and we do not think that it can fairly be said that this list of persons refers only to forgeries and not to counterfeits. Also included in the section is a clause as to loss incurred by relying on written documents which prove to have been 'raised or otherwise altered or lost or stolen.' As to these no mention of the signature is made, thus creating a special class of documents which may give rise to liability whether the signature is genuine or not. The omission of the phrase, as to the signature, in describing this class of documents and the inclusion of the phrase in the description of the documents first mentioned above is worthy of note. Immediately following it the clause having guaranteed or witnessed a signature, again demonstrating the emphasis placed by the draftsman on the signature rather than on the contents of the writing, or its falsity as a whole. At the end of Section (E) of the bond it is provided that mechanically reproduced facsimile signatures are treated the same as handwritten signatures and no reason appears why this more liberal provision

> should be applied to forged but not to counterfeited instruments. Finally, there is the significant exclusion clause that losses which result from the non-payment of a loan obtained by fraud or false pretenses are not covered by the bond. This provision obviously shows that the bond is not intended to cover losses incurred through reliance on false pretenses generally unless the fraud is accomplished by the use of a counterfeited or forged signature.'"

In its opinion the Court of Appeals further concluded as follows:

> "The papers by which such misrepresentation were effectuated, having no intrinsic value in themselves and being non-negotiable, are not the usual subject of counterfeiting or forgery. When they are fictitious only in the sense that they contain an implicit or explicit representation that a valid, collectible, but uncollected, receivable exists, it is very doubtful, whatever writing appeared upon them, they could be held to be the subject of counterfeiting or forgery so long as the writing did not misrepresent their origin".

This decision is in accord with the many other decisions upon the same or similar questions cited in our previous brief and discussed for convenience below.

In *State Bank of Poplar Bluff vs. Maryland Casualty Company, supra*, the plaintiff sued upon the same bond here involved to recover losses it suffered from the non-payment of loans secured by chattel mortgages on automobiles which were not in existence or in the possession

of the mortgagor. The court held that the mortgages were neither counterfeited nor forged within the meaning of the bond.

This case also involved documents which in genuine have legal significance and value, whereas duplicate invoices have no intrinsic value.

The decision of the Eighth Circuit in that case has been accepted by the State Courts as well as other Circuits as stating the correct interpretation of the bond.

In the case of *United States Fidelity and Guaranty Company* vs. *First National Bank of Fort Morgan*, *supra*, the Colorado Supreme Court, with reference to the Bank of Poplar Bluff decision, said:

"The rule announced therein is unquestionably supported by the great weight of authority."

In that case, the Colorado Supreme Court considered the identical bond and fact situation here involved. In holding that the bond did not cover losses resulting from the non-payment of loans secured by the assignment of fictitious accounts receivable represented by fabricated invoices, the Colorado Court said:

"It is clear from the language of the bond that the liability of the guaranty company is limited to instruments which have been counterfeited or forged as to the signature of any maker, drawer, etc. It is not contended here that a false signature appeared upon any of the invoices involved. The words com-

terfeited or forged even though not specifically connected to the signature upon an instrument, do not include in their meaning the making of a false statement of fact within the body of an instrument otherwise genuine."

As before stated, the decision in *Fidelity Trust Company* vs. *American Surety Company*, *supra*, was a complete departure from the weight of authority at that time as represented by the following decisions:

Pasadena Investment Co. v. *Peerless Casualty Co.*, *supra*; involving a claim for losses resulting from the non payment of loans secured by the assignment of accounts receivable which did not exist and the use of fictitious duplicate invoices as in the instant case. The bond involved in that case was the Bankers Blanket Bond covering losses resulting from loans made upon "securities, obligations or other written instruments which prove to have been forged, counterfeited, raised or otherwise altered." The California Court held that the duplicate invoices involved were neither counterfeited nor forged.

The Bankers Blanket Bond there involved was in the form of the bond before it was revised by adding to the words "counterfeited" and "forged" in Clause (E) the words "as to the signature of".

Torrance National Bank vs. *Aetna Casualty and Surety Company*, *supra*, in which it was held that a check of a corporation signed by its treasurer with an authorized but did not constitute a forgery under the bond herein involved.

Fitzsimmons Bolder Co., Inc. vs. *Employers Liability Assurance Corp. Ltd.*, *supra*, in which the Second Circuit

Court of Appeals held that checks signed by officers of a corporation who were induced to sign by fraudulent representations of the treasurer by means of fictitious vouchers, did not constitute forgery within the bond sued upon.

In *Fidelity Trust Company* vs. *American Surety Company*, *supra*, relied upon by petitioner, and which now stands alone and rejected, the Court ignored the phrase "as to the signature of" in Clause (E), as well as the factual and legal insignificance of a duplicate invoice, which the opinion and the facts appearing in the instant case so graphically demonstrated. Apparently, the Court of Appeals in that case was greatly influenced by its previous decision in *Provident Trust Company* v. *National Surety Co.*, 3rd Cir. (1943), 138 F. 2d 252. In the latter case, it was held that warehouse receipts for goods that did not exist were covered by the Bankers Blanket Bond covering instruments were "forged or altered" under Clause (D) of the bond. Since that decision the wording of Clause (D) of the Bankers Blanket Bond was revised to cover only "instructions or advices which *bear the forged signature*" of a person. Under the statutes of Pennsylvania, the Court of Appeals held that the fictitious warehouse receipts constituted forgery. These statutes were different from those of North Carolina or Missouri.

As pointed out above, the Sixth Circuit Court of Appeals in the Bank of Memphis case held that properly signed warehouse receipts for beans that were not in the warehouse did not constitute forged documents within the meaning of either Clause (D) or Clause (E) of a similar bond.

In its opinion the Court of Appeals further pointed out that the presentation of the duplicate invoices was merely

another form of falsely representing that the accounts assigned were genuine and a form of deceit specifically excluded from the bond, saying:

> "These same representations were contained in more explicit form in the loan agreement, though the Bank, and apparently no one else, has suggested that the loan agreement, on that account, is counterfeited or forged as to signature. The financial statements which the Lumber Company filed with the Bank and upon which the Bank relied were equally false, for they included in reported accounts receivable all of these spurious transactions. The ledger sheets which reflected these fictitious transactions which the Bank inspected and upon which the Bank relied were similarly false, but no more can be said of any of these instruments, including the duplicate invoices, than that they were all part of the scheme of misrepresentation of the Lumber Company's sales and outstanding receivables. All of them were clearly the acts of Callahan and the Lumber Company, and there was no misrepresentation of the person or persons responsible for them."

Had it been necessary, the Court of Appeals might well have concluded that invoices were not the documents or instruments covered by Clause (E) as did the Massachusetts Court in *Rockland Athys. National Bank v. Massachusetts Bond and Indemnity Co.*, (Mass. 1950), 157 N.E. 2d 235. In that case it was held that a letter purporting to certify the correctness of a borrower's financial statement upon which the signature of a Certified Public Accountant had been forged, was not within the coverage of Clause (E) of the bond herein involved. A similar

conclusion was reached by the English Court in *Equitable Trust Company v. Henderson*, (1930) 47 Times L. 90, in which a false financial statement was held not to be the subject of forgery.

The other decisions on the question here presented were made upon fact statements alleged or stipulated. Here, the facts were developed by the testimony of the participants, C. K. Callaham and officials of the plaintiff bank. This testimony showed beyond any question the true nature of accounts receivable financing, the insignificance of the duplicate invoices, the fact that the Bank made its own investigation of the records of its borrower, and in reality made its loans in reliance upon these records and its conclusion that the Lumber Company had a prosperous business.

The duplicate invoices were neither "forged" nor "altered as to the signature of any person" under the law of North Carolina.

In its complaint and throughout the trial of this case, petitioner did not contend or argue that the duplicate invoices were "forged as to the signature of" any person, apparently rejecting such argument as untenable. Petitioner's counsel made such an argument for the first time in his brief to the Court of Appeals.

Petitioner's argument on this point is based upon the decision of the Seventh Circuit in *Security National Bank of Poland v. Fidelity and Casualty Company of New York*, 24 F. 2d 582 (1957), and the North Carolina decision in *Peoples Bank and Trust Company v. Fidelity and Casualty Company*, 238 N.C. 510, 77 S.E. 2d 800

Neither of these decisions has any application to the facts of the instant case.

The decision in the Bank of Durand case was based squarely upon the decision of that Court of Appeals in *Quick Service Box Company* v. *St. Paul Mercury Indemnity Company*, 7th Cir., 95 F. 2d 15, interpreting the statutes of the state concerning forgery, and holding that the filling in by an office manager of blank checks signed by officers of his company and covering the same to the office manager's use constituted forgery. The Court pointed out in its opinion however that "Quick apparently represents a minority view", a view contrary to the decisions of many other courts, particularly *Fitzgibbons, Boiler Company* v. *Employers' Liability Assurance Corporation, supra*, and other decisions cited in 37 C. J. S. Forgery, Sec. 8.

The Seventh Circuit rejected the argument that the duplicate invoices were "counterfeited", and the Third Circuit subsequently rejected the argument that they were "forged as to the signature of" a person. Thus the two decisions relied upon by the petitioner were based upon mutually inconsistent interpretations of the bond.

The decision of the North Carolina Supreme Court in *Peoples Bank and Trust Company* v. *The Fidelity and Casualty Company*, *supra*, has no application to the facts of this case for the following reasons:

(1) The forgery in that case consisted of the signing of a name which purported to be and was presented as the signature of a person other than the signator. Here, there was no representation that Callahan's signature was that of any other person.

(2) The signature on a check is necessary to its validity. The signature of Callahan upon the duplicate invoices and the appearance thereon of the notations that he *had* assigned the account to the Bank was unnecessary, and was of no significance. They did not appear on the original invoices. Under North Carolina law, such an unnecessary signature could not constitute forgery.

(3) The copies of invoices signed or unsigned had no legal efficacy, or intrinsic value, and could not form the basis of any legal right, and under North Carolina law such papers could not be the subject of forgery.

Petitioner's argument with respect to forgery is completely answered by the Court of Appeals in the following language:

"Here, there is such a contention. It is founded upon the fact that all of the duplicate invoices deposited with the Bank bore a form of assignment and notice to the purported customer to remit to the Bank. Such notices of assignment had been affixed to all original invoices during the period when the notification procedure had been followed by the Bank and the Lumber Company. Such assignments and notices had been omitted from all original, valid invoices after the notification procedure was abandoned. For some reason, however, Callahan continued to affix such legends upon the duplicate invoices deposited with the Bank, and, in most instances, these were actually signed by J. W. Callahan for the lumber company.

"Falsity here did not reside in the assignment, however. The falsity lay in the implicit misrepresentation made to

the Bank when the Lumber Company deposited with the Bank the duplicate invoices. Certainly as the term "forgery" is commonly understood the fact that an instrument contains a false representation does not lead to the conclusion that the instrument is forged or "forged as to signature." The negotiator of a worthless check bearing his signature represents that he has on deposit sufficient funds with which the check may be paid, but, when he affixes his own signature to the worthless check and does not represent himself to be another, his crime is distinct from that of the forger. Moreover, here, the assignments and the execution of the assignments were quite unnecessary, for the deposit of the duplicate invoices under the loan agreement was quite sufficient, *inter sese*, for the transfer to the Bank of the rights of the Lumber Company in the receivable the duplicate invoice represented or purported to represent. In North Carolina, it has been held that falsification of a signature is not forgery, unless the signature is necessary to the validity of the instrument or the effectuation of the transaction." (citing *State* v. *Gherkin*, 29 N.C. 206, in which it was held that falsely putting a witness' name to a bond which was not required to be attested by a subscribing witness does not affect the validity of the bond and is therefore not a forgery.)

Not only was the signature of Callahan not necessary to effectuate the assignment of any account, neither the notation of assignment nor his signature served any purpose on the duplicate invoices. A similar notation had appeared upon the original invoices when customers had remitted direct to the Bank. The wording of the notation was not an assignment in itself, but merely a request to the customers. It was a relic of the notification practice, and was obsolete. Its continued use was surplusage, and

constituted no part of the invoice itself, did not mislead the Bank, and actually played no part in Callaham's fraudulent scheme. Under no circumstances could such a notation or signature thereto constitute forgery under the law of North Carolina.

Under North Carolina law, as pointed out by the Court in *Peoples Bank* v. *Casualty Company*, *supra*, there can be no "forgery" of a paper writing which if genuine would have no legal efficacy, and an invoice or unaccepted bill for goods has no legal efficacy or significance. As defined in that decision forgery is "the false making with intent to defraud of any writing, which, if genuine, might apparently be of legal efficacy or the foundation of a legal liability."

The North Carolina Court also held that the erasure or obliterating of a release on the back of a bond is not a forgery, despite the intent to defraud, *State* v. *Danbury*, 28 N.C. 70 (1845), and that the signing of the name of a candidate for Congress to a statement in an advertisement purporting to indicate the candidates views of proposed legislation does not constitute forgery, because the candidate could not be held liable for a breach of such expression of views or promises if his signature were genuine, *Barnes* v. *Crawford*, 115 N.C. 76 (1894).

The true nature of the fraud practiced upon petitioner by Callaham, and its exclusion from the bond is fully described by the Court of Appeals as follows:

"Of course, the Lumber Company and its officers Callaham were guilty of gross misrepresentation and of false pretense, but losses upon loans secured by such means are not within the coverage of the bond. The deposit of the duplicate invoice carried with it the implicit representation

that the customer whose name appeared thereon had ordered goods which the lumber company had delivered or shipped, that the purchase price was the amount which appeared upon the invoice that the purchase price had not been paid, and that the customer had no offsetting claims against the Lumber Company. These same representations were contained in more explicit form in the loan agreement, though the Bank, and apparently no one else, has suggested that the loan agreement, on that account, is counterfeited or forged as to signature. The financial statements which the Lumber Company filed with the Bank and upon which the Bank relied were equally false, for they included in reported accounts receivable all of these spurious transactions. The ledger sheets which reflected these fictitious transactions, which the Bank inspected and upon which the Bank relied, were similarly false, but no more can be said of any of these instruments, including the duplicate invoices, than that they were all part of the scheme of misrepresentation of the Lumber Company's sales and outstanding receivables. All of them were clearly the acts of Callaham and of the Lumber Company, and there was no misrepresentation of the person or persons responsible for them. The duplicate invoices, as the other writings used to effect and maintain the misrepresentation, cannot be said to have been "counterfeited or forged as to signature."

It is therefore apparent that the delivery of the duplicate invoices to the Bank was no more than another form of Callaham's many forms of representing that the assigned accounts receivable were genuine and outstanding.

The statutes of North Carolina use the expressions "forge" and "counterfeit" synonymously. Section 14-119 of the General Statutes of North Carolina provides punish-

ment for any person who "shall falsely make, forge or counterfeit . . . any bill, or note imitation of . . . a bill or note of a bank or of the State". Section 14-120 of these statutes punishes the uttering of such "forged" or "counterfeited" paper. General Statutes 14-122 provides punishment for any person who shall "falsely forge and make, . . . any deed, lease, or other notes, assignments, receipt for any security for the payment of money, or order for the money or goods, or release for any security for the payment of money, or order for the payment of money".

Again, these statutes refer to the false making of instruments which possess intrinsic value, have legal efficacy, or which can form the basis of a legal obligation or right, and which is represented to be the act of a person other than the person signing the same.

On the other hand, the statutes of some states define forgery broadly enough to include the act of "falsely making" any paper writing for the purpose of defrauding another person. As stated in *Provident Trust Co.* vs. *National Surety Company*, *supra*, cited by petitioner, "under the law of Pennsylvania the making of a false statement in a warehouse receipt is a forgery".

Our contentions regarding the law of forgery are supported by the following decisions which are cited in the opinion of the Court of Appeals:

Greathouse v. *United States*, 4 Cir., 170 F. 2d 512, 514

United States v. *Brotea*, 2 Cir. 246 F. 2d 541

Martoccy v. *United States*, 10 Cir. 216 F. 2d 709

Goetcher v. *The State of Nebraska*, 113 Neb. 352, 204 N.W. 967

United States v. *Mulligan*, 2 Cir., 59 F. 2d 200

The decision in the instant case is also in accord with the decision of this Court in *Gilbert v. United States*, 370 U.S. 650, 82 S. Ct. 1572 8 L. Ed. 801, to the effect that where the falsity of an instrument lies in the representation of facts contained in the instrument and not in the genuineness of its execution, it is not a counterfeit or a forgery. A similar result was reached by the Third Circuit in *United States v. Carabasi*, 292 F. 2d 362, decided since the Fidelity Trust case.

The bond is not ambiguous, and under the well established rule of the North Carolina Court and of this Court its terms should be given their usual and ordinary meaning.

As shown by the opinion of the Court of Appeals, and the other decisions above discussed, the provisions of the bond are not ambiguous. Therefore, petitioner can obtain no assistance from its contention that in the event of an ambiguity a contract should be construed against its author. As before stated, petitioner's statement of the question here presented incorrectly assumes the existence of an ambiguity. Petitioner's contention on this point is answered by the Court of Appeals as follows:

> "As in South Carolina, it is settled in North Carolina that insurance contracts are to be construed as other contracts, and that, in the absence of ambiguity, the terms are to be given their usual and ordinary meanings, the objective being to discover and enforce the real intention of the parties."

Powers v. Travelers' Company, 180 N.C. 335, 119 S.E. 481

McCain v. *Hartford Live Stock Ins. Co.*, 190 N.C. 549, 130 S.E. 186;

Bailey v. *Life Ins. Co. of Va.*, 222 N.C. 716, 24 S.E. 2d 614

Ford v. *New York Life Ins. Co.*, 222 N.C. 154, 22 S.E. 2d 235

Bolich v. *Provident Life & Accident Ins. Co.*, 205 N.C. 43, 169 S.E. 826

McDaniel, Administratrix, v. *Imperial Life Insurance Company*, 243 N.C. 275, 90 S.E. 2d 546

Marshall v. *Washington National Insurance Co.*, 246 N.C. 447, 98 S.E. 2d 345

This is in accord with the rule adhered to by this Court, and by all of the Courts of this country, and no further expression of this Court upon this subject is needed. *Bergholm* v. *Peoria Life Insurance Company*, 284 U.S. 480, 52 S. Ct. 230.

Petitioner's Status as a National Bank is Immaterial.

The fact that the petitioner is now a National Bank which status it acquired after its losses were incurred, does not raise any question under federal laws, nor does it constitute any reason for granting the petition.

This action involves a private contract between private parties. The Bankers Blanket Bond, Standard Form No. 24, herein involved, was said in the findings of fact in the Bank of Memphis case to have been worked out between the Surety Association of America and the American Bankers Association for use in all states. Its terms are

still subject to change. The interpretation of its terms are governed by the laws of the state in which it is issued.

As heretofore stated, the rule adhered to by this Court and the Supreme Court of North Carolina to the effect that the provisions of such a contract will be given their usual, natural and ordinary meaning, need no further pronouncement or clarification.

This reason for review was also urged in the petition for a Writ of Certiorari filed in *The First National Bank of Memphis* v. *Aetna Casualty and Surety Company*, *supra*.

CONCLUSION

We submit that the law upon the questions here involved was well settled before the decision of the Court of Appeals in this case was rendered. Certainly any vestige of doubt as to the correctness of this law was dispelled by the clear and cogent reasoning of the Court of Appeals in its opinion herein; and a denial of the Petition would confirm this evaluation of the opinion.

There is no question herein presented which is of any public interest. While bonds similar to the one involved are issued throughout the country to various banks, both state and national, which are subject to such changes as might be worked out between the surety companies through their association and the banks through its association, no federal or constitutional question is involved. Since the interpretation of any such contract is determined by the laws of the state in which it is issued and made, a decision of this court would not necessarily be controlling

in other cases. Certainly, the petition fails to meet the requirement that any alleged conflict of opinion between the Courts of Appeal must be real and embarrassing before this Court will grant a petition for a Writ of Certiorari, and then only in cases involving a principle, the settlement of which is of importance to the public as distinguished from the parties to the litigation. *Rice* vs. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897.

It is, therefore, respectfully submitted that the Petition for a Writ of Certiorari should be denied.

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APPENDIX

EXCERPTS FROM PLAINTIFF'S EXHIBIT A—BOND (TR. 13)

* * *

The full text of Clause (E) is as follows:

"(E) Any loss through the Insured's having, in good faith and in the course of business, whether for its own account or for the account of others, in any representative, fiduciary, agency or other capacity, either gratuitously or otherwise, purchased or otherwise acquired, accepted or received, or sold or delivered, or given any value, extended any credit or assumed any liability, on the faith of, or otherwise acted upon any securities, documents or other written instruments which prove to have been counterfeited or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any person signing in any other capacity, or raised or otherwise altered or lost or stolen, or through the Insured's having, in good faith and in the course of business, guaranteed in writing or witnessed any signatures, whether for valuable consideration or not and whether or not such guaranteeing or witnessing is ultra vires the Insured, upon any transfers, assignments, bills of sale, powers of attorney, guarantees, endorsements or other documents, upon or in connection with any securities, obligations or other written instruments and which pass or purport to pass title to such securities, obligations or other written instrument; EXCLUDING HOWEVER, any loss through FORGERY OR ALTERATION of, or on any checks, drafts, acceptances,

withdrawal orders or receipts for the withdrawal orders or receipts for the withdrawal of funds of property, certificates of deposit, letters of credit, warrants, money orders or orders upon public treasuries; and excluding, further, any loss specified in subdivisions (1) and (2) of Insuring Clause (D) as printed in this bond, whether or not any amount of insurance is applicable under this bond to Insuring Clause (D).

Mechanically reproduced facsimile signatures are treated the same as handwritten signatures."

In addition to the exclusions of the bond quoted in the appendix to the plaintiff's brief in the Court of Appeals, the bond provided as follows:

EXCLUSIONS—Section 1. "THIS BOND DOES NOT COVER:

"(d) Any loss the result of the complete or partial nonpayment of or default upon any loan made by or obtained from the Insured, whether procured in good faith or through trick, artifice, fraud or false pretenses, except when covered by Insuring Clauses (A), (D) or (E)."